(8) 713 b
37pgs

No. 06-984

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF *AMICUS CURIAE* OF THE GOVERNMENT OF THE UNITED MEXICAN STATES IN SUPPORT OF PETITIONER JOSÉ ERNESTO MEDELLÍN

SANDRA L. BABCOCK
BLUHM LEGAL CLINIC
NORTHWESTERN LAW SCHOOL
357 E. Chicago Avenue
Chicago, IL 60611
(312) 503-0114

Counsel of Record for
Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Mexico and the United States Agreed by Treaty to Submit Disputes Regarding the Vienna Convention to the International Court of Justice for Binding Resolution 5

II. The United States and Mexico Have Consistently Recognized That When a Dispute Is Submitted by Mutual Consent to an International Tribunal, the Resulting Judgment Is Binding. 6

III. The Protection of Nationals Abroad Has Long Been a Priority of Both Mexico and the United States. 13

A. Mexico Has an Active and Longstanding Tradition of Providing Extensive Consular Services to Its Nationals 14

B. The United States Has Been a Forceful Advocate for the Consular Rights of American Citizens Detained in Mexico 18

IV. The International Court of Justice Issued a Binding Judgment that Adjudicated the Rights of Individual Mexican Nationals..... 19

V. The United States Is Obligated to Fully Implement the *Avena* Judgment. 24

CONCLUSION 27

TABLE OF AUTHORITIES

Federal Cases

Frelinghuysen v. United States ex rel. Key, 110 U.S. 63 (1884) 9, 26

La Abra Silver Mining Company v. United States, 175 U.S. 423 (1899) 9

Sanchez Llamas v. Oregon, 126 S. Ct. 2669 (2006) 23, 24

State Cases

Ex parte Medellin, No. AP-75207, 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006) 2, 24, 25

Marquez-Burrola v. State, 157 P.3d 749 (Okla. Crim. App. 2007) 15

Torres v. State, , 120 P.3d 1184 (Okla. Crim. App. 2005 ... 15

Valdez v. State, 46 P.3d 703 (Okla. Crim. App. 2001) 16

International Cases

Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31) ..... passim

Francisco Quintanilla (Mexico v. United States), Opinions

of the Commissioners 136 (1926) 7

Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1 (ICSID AF) (Aug. 30, 2000) 7, 12

Treaties

Air Transport Agreement Between the Government of the United States of America and the Government of the United Mexican States, Aug. 15, 1960, U.S.-Mex., 12 U.S.T. 60 3

Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., 57 Stat. 800 13

Convention Between the United States of America and the Republic of Mexico for the Adjustment of Claims, July 4, 1868, U.S.-Mex., 15 Stat. 679 ..... 8, 9

Convention for the Arbitration of the Chamizal Case, June 24, 1910, U.S.-Mex., 36 Stat. 2481 10

Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Sept. 18, 1992, U.S.-Mex., 1992 U.S.T. LEXIS 193 3

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, 14 U.N.T.S. 45. 3

International Convention for the Prevention of Pollution of the Sea by Oil, *opened for signature* May 12, 1954, 12 U.S.T. 2989 3

North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 12

Optional Protocol Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325 ..... passim

Protocol for the Adjustment of Certain Contentions Arising Under What is Known as the "Pious Fund of the Californias," May 22, 1902, U.S.-Mex., 9 Bevans 12, 1902 U.S.T. LEXIS 50 10

Statute of the International Court of Justice, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1055.. 6, 24

United Nations Charter, art. 94, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1031 6

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, 1988 U.S.T. LEXIS 194 3

Universal Copyright Convention, *opened for signature* Sept. 6, 1952, 6 U.S.T. 2731 3

Other Authorities

A.H. FELLER, THE MEXICAN CLAIMS COMMISSIONS (1935).. 7, 8, 9

A.M. STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS 653 (1990) 3

ALAN C. LAMBORN & STEPHEN P. MUMME, STATECRAFT, DOMESTIC POLITICS, AND FOREIGN POLICY MAKING: THE EL CHAMIZAL DISPUTE (1988) 11

ANTONIO GÓMEZ ROBLEDO, MEXICO Y EL ARBITRAJE INTERNACIONAL (1965) 12

Application Instituting Proceedings, (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003) 5

Brief *Amicus Curiae* of the United Mexican States in Support of José Ernesto Medellín, No. AP-75207, 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006) 2

Convention With Mexico for Solution of the Problem of the Chamizal: Hearings Before the Committee on Foreign Relations, United States Senate, 88th Cong. (1963) 11

Counter-Memorial of the United States of America (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) (Nov. 3, 2003) 17, 20

Eye on Investors, Mexico Pays U.S. Company, N. Y. TIMES, Oct. 29, 2001 12

FRANCIS J. WEBER, THE UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND (1969) .. 10, 11

FREDERICK DUNN, THE DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO (1933). 7, 8, 9

HOWARD N. MEYER, THE WORLD COURT IN ACTION: JUDGING AMONG THE NATIONS (2002) 10

INTERNATIONAL COURT OF JUSTICE, ICJ HANDBOOK 75 (5th ed. 2004) 26

JOHN BASSETT MOORE, 4 INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY (1898) 7, 8

Memorial of Mexico (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) (June 20, 2003) 20

Petition for Writ of Certiorari, *Medellín v. Texas,* 127 S. Ct. 2129 (2007) 24

President's Message to the Senate Transmitting the Convention for the Solution of the Problem of the Chamizal, 88th Cong. (1963) 12

Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire,* N.Y. TIMES, Oct. 26, 2000 16

REPORT OF JACKSON H. RALSTON, IN THE MATTER OF THE CASE OF THE PIOUS FUND OF THE CALIFORNIAS (1902) 10

Reports of International Arbitral Awards, v. IX at 5, U.N. Sales No. 59.V.5 (1948) 10

SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL DISPUTE (1965) 11, 12

Transcript of the President's News Conference on Foreign and Domestic Matters, N.Y. TIMES, July 6, 1962 12

Two Mexicans Die in Electric Chair, N.Y. TIMES, Jan. 28, 1921 16

U.S. Boundary Relations, 3 Whiteman DIGEST §30 (1964) ... 7

U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International, Political and Military Affairs, 94th Cong. (1975) 18, 19

U.S. DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, FOREIGN EMBASSIES AND CONSULATES IN THE UNITED STATES 14

William Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies*, 31 VAND. J. TRANSNAT'L L. 257 (1998) 16

INTEREST OF AMICUS CURIAE[1]

By signing and ratifying the Vienna Convention on Consular Relations, opened for signature Apr. 24, 1963, 21 U.S.T. 77, the Governments of Mexico and the United States made commitments to each other, to their other treaty partners, and to the rule of law. Specifically, the United States promised that detained Mexican nationals would be promptly notified of their right to seek consular assistance, and that Mexico would be permitted to provide consular protection to those nationals. In turn, Mexico promised to extend those same rights to the United States and to its nationals detained in Mexico. And by signing and ratifying the Optional Protocol to the Vienna Convention, the Government of Mexico and the Government of the United States agreed that irreconcilable disputes over the interpretation and application of the treaty's provisions would be resolved by the International Court of Justice ("ICJ"). Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325.

On March 31, 2004, the ICJ rendered its judgment in *Avena and Other Mexican Nationals*. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31)[hereinafter "*Avena* Judgment"]. The ICJ held that the United States had violated the rights of Mexico and of Mr. Medellín under Article 36 of the Vienna Convention. As a

---

[1] No person or entity other than the Government of Mexico made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this *amicus*.

remedy for those violations, the ICJ held that the United States must provide Mr. Medellín with meaningful review and reconsideration of his conviction and sentence that gives full effect to the purposes of Article 36.

On February 28, 2005, President George W. Bush determined that the United States would discharge its international legal obligations under the *Avena* Judgment by having state courts give effect to the ICJ's decision. Mexico welcomed the President's Determination as confirmation that the United States would comply with its treaty obligations to Mexico and Mr. Medellín. Accordingly, Mexico filed an *amicus* brief in the Texas Court of Criminal Appeals urging the court to implement the *Avena* Judgment and the President's Determination. Brief *Amicus Curiae* of the United Mexican States in Support of José Ernesto Medellín, No. AP-75207, 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006). On November 15, 2006, the Texas Court of Criminal Appeals held that neither the *Avena* Judgment nor the President's Determination constituted binding federal law, brushing aside the legal obligation of the United States to abide by the remedial decree entered against it in an international adjudicative proceeding that it had agreed by treaty to accept as binding. *Ex parte Medellín*, No. AP-75207, 2006 WL 3302639, at *7, *24 (Tex. Crim. App. Nov. 15, 2006).

As a party to the *Avena* proceedings, Mexico has a direct interest in the implementation of the ICJ's judgment. It has been nearly three years since the ICJ ruled in *Avena*, and the United States's promise to comply with the ICJ's decision remains unfulfilled. Mexico respectfully requests that this Court uphold the promises the United States made to Mexico

and the world community by ordering the review and reconsideration mandated by the International Court of Justice in *Avena*.

SUMMARY OF ARGUMENT

When Mexico and the United States agreed to submit to the jurisdiction of the International Court of Justice, both parties recognized that they would be bound by the Court's final judgment. The two countries are both party to over 50 instruments that provide international dispute resolution mechanisms.[2] Indeed, over the last two centuries, Mexico and the United States have settled hundreds of disputes in this manner.[3] While the facts of the cases, the composition of the

---

[2] The subject matter of these treaties encompasses topics as diverse as taxation, *see* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Sept. 18, 1992, U.S.-Mex., art. 26, 1992 U.S.T. LEXIS 193; copyrights, *see* Universal Copyright Convention, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731; narcotics, *see* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, art. 32, 1988 U.S.T. LEXIS 194, *80-81; pollution, *see* International Convention for the Prevention of Pollution of the Sea by Oil, *opened for signature* May 12, 1954, art. XIII, 12 U.S.T. 2989; aviation, *see* Air Transport Agreement Between the Government of the United States of America and the Government of the United Mexican States, Aug. 15, 1960, art. 13, U.S.-Mex., 12 U.S.T. 60; and chemical weapons, *see* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, art. XIV, 14 U.N.T.S. 45.

[3] For a partial list of arbitrations to which each country has submitted, *see* A.M. STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS 653, 636-37 (1990).

tribunals, and the rules of procedure have differed, each country has consistently recognized that when it commits itself to resolve a dispute by submitting to the jurisdiction of an international tribunal, it agrees to be bound by the result.

In recent years, Mexico and the United States have disagreed on the scope of the rights established by Article 36. After the two nations failed to resolve their differences through diplomatic channels, Mexico exercised its right to submit the dispute to the International Court of Justice for binding resolution. In doing so, Mexico expressly invoked the rights of its nationals and sought specific remedies on their behalf in its exercise of diplomatic protection. The ICJ weighed the arguments of the parties and the facts of each Mexican national's case, and issued a carefully reasoned judgment adjudicating the rights of Mr. Medellín and 51 other Mexican nationals, thereby settling the dispute that had, at times, strained relations between the two nations.

Under both international and United States law, the *Avena* judgment constitutes a binding adjudication of Mr. Medellín's rights that the United States must fully implement. Cordial and cooperative bilateral relations depend strongly upon good faith compliance by each nation with mutually binding treaty obligations. Each nation expects, and must be able to rely upon, its treaty partners to adhere to their obligations. President George W. Bush recognized this cardinal principle of foreign affairs when he issued the February 28 Presidential Determination.

ARGUMENT

I. Mexico and the United States Agreed by Treaty to Submit Disputes Regarding the Vienna Convention to the International Court of Justice for Binding Resolution.

When the United States and Mexico ratified the Vienna Convention on Consular Relations and its Optional Protocol, they exchanged solemn promises to abide by the terms of those instruments. Article 1 of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. 1.

On January 9, 2003, after determining that the United States had violated the Vienna Convention in virtually every case in which a Mexican national was facing the death penalty, and after unsuccessfully seeking remedies for those nationals through legal and diplomatic channels, Mexico invoked the Optional Protocol and brought suit in the International Court of Justice. *See* Mexico's Application Instituting Proceedings, (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003), *available at* http://www.icj-cij.org. The United States fully participated in those proceedings, at the

conclusion of which the ICJ found that the United States had violated the Article 36 rights of 51 Mexican nationals, including Mr. Medellín. *Avena* Judgment, ¶ 153(4)–(7).

The binding character of the commitment the United States made in the Optional Protocol is reinforced by the United Nations Charter, also ratified by both the United States and Mexico. By Article 94(1) of the Charter, the United States expressly agreed to "comply with the decision of the International Court of Justice in any case to which it is a party." United Nations Charter, art. 94, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1031. By Article 59 of the Statute of the International Court of Justice, which forms part of the Charter, the United States expressly agreed that judgments of the Court have "binding force" upon it in cases to which it is a party. Statute of the International Court of Justice, art. 59, *opened for signature* June 26, 1945, T.S. No. 993, 59 Stat. 1055.

Without the United States's express consent, the International Court of Justice could not have heard the *Avena* case or rendered its judgment. Having given its consent, and having fully participated in the proceedings, the United States must now abide by the result.

II. The United States and Mexico Have Consistently Recognized That When a Dispute Is Submitted by Mutual Consent to an International Tribunal, the Resulting Judgment Is Binding.

As neighbors and trading partners, the United States and Mexico have an extraordinarily close relationship. Inevitably,

the two nations have differed on matters ranging from boundary lines and trade practices to the treatment of each country's nationals. When such disagreements have arisen, Mexico and the United States have attempted to resolve them amicably, often through arbitration. Arbitration has staved off armed conflict,[4] resolved boundary disputes,[5] and indemnified private investors[6] as well as individuals who claimed personal injury[7] or denial of due process.[8] Both countries have benefited from international arbitration of their disputes. This may explain why "the history of the relations between the United States and Mexico shows a constant endeavor to resort to this means of settlement." A.H. FELLER, THE MEXICAN CLAIMS COMMISSIONS 1 (1935).

Conflicts over the treatment of United States citizens in Mexico were a recurring theme in early diplomatic relations between the two countries. DUNN, *supra*, at 1-2. In the mid-

---

[4] *See, e.g.*, FREDERICK DUNN, THE DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO 10-27 (1933).

[5] *See* U.S. Boundary Relations, 3 Whiteman DIGEST §30, at 680-84 (1964) (describing the agreement of the United States to abide by the terms of arbitral judgment regarding disputed tract of land known as "El Chamizal" in El Paso, Texas).

[6] *See Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (ICSID AF) (Aug. 30, 2000) [hereinafter *Metalclad*].

[7] *See Francisco Quintanilla* (Mexico v. United States), Opinions of the Commissioners 136 (1926).

[8] *See* JOHN BASSETT MOORE, 4 INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3251 (1898).

nineteenth century, United States citizens flocked to Mexico in great numbers. FELLER, *supra,* at 1. Many complained they were subjected to unequal treatment, illegally detained, deprived of due process, or otherwise wronged by Mexican authorities. *See generally* MOORE, *supra,* at 3235-3252. They sought protection from the United States government, which in turn pressed their claims upon the Government of Mexico. *See, e.g.,* DUNN, *supra,* at 18-19. The frequency with which such claims were brought by the United States against Mexico led one commentator to observe that "[t]he subject of the claims of foreign nationals plays a more important role in the history of the foreign relations of Mexico than in that of any other country." FELLER, *supra,* at 1.

Diplomacy proved unable to resolve these disputes, and the unsettled claims of United States citizens in Mexico were cited as justification for war with Mexico in 1846. *See* DUNN, *supra*, at 45-49. After the war, United States citizens continued to allege mistreatment by Mexican authorities. This time, the two nations signed the Claims Convention of 1868, which established a Commission to hear the claims of both Mexican and United States citizens for property damage, personal injury, and wrongful detention.[9] Convention Between the United States of America and the Republic of Mexico for the Adjustment of Claims, July 4, 1868, U.S.-Mex., art. II, 15 Stat. 679, 681. After reviewing more than 2,000 claims, the

---

[9] *See, e.g.,* MOORE, *supra,* at 3243-44 (describing the wrongful imprisonment claim of A.H. Halstead, which resulted in an arbitral judgment of $1,600.00); *id.* at 3247 (describing the arbitrary detention claim of William P. Barnes, resulting in arbitral judgment of $5,100.00); *id.* at 3251 (describing the wrongful detention claim of Augustus Jonan, resulting in arbitral judgment of $35,000.00 in Mexican gold).

Commission entered judgments against Mexico totaling over $4,000,000.00, a sum far greater than that assessed against the United States. FELLER, *supra,* at 6. Mexico promptly complied with the Commission's judgment. *See Frelinghuysen v. United States ex rel. Key,* 110 U.S. 63, 67 (1884) ("the government of Mexico has promptly and in good faith met its annual payments"); DUNN, *supra*, at 112.

Mexico never disputed its legal obligation to comply with the judgments of the 1868 Claims Commission, even in the face of compelling evidence that some claims were fraudulent.[10] *See La Abra Silver Mining Company v. United States,* 175 U.S. 423, 458 (1899); *Frelinghuysen,* 110 U.S. at 67 (1884). In *Frelinghuysen*, the Court accepted that the judgments of arbitral tribunals "are final and conclusive until set aside by agreement between the two governments." 110 U.S. at 67. The Court further observed that "Mexico cannot, under the terms of the treaty, refuse to make the payments at the times agreed on if required by the United States. This she does not seek to do." *Id.* at 467-68.

Mexico and the United States have also resorted to international arbitration to resolve economic disputes. In the case of the Pious Fund of California, the Claims Commission awarded the Catholic church of California the sum of

---

[10] Article 2 of the Claims Convention provided that "[t]he president of the United States. . . and the president of the Mexican republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively, and to give full effect to such decision without any objection, evasion, or delay whatsoever." 15 Stat. 679.

$904,070.79, which Mexico paid in full. REPORT OF JACKSON H. RALSTON, IN THE MATTER OF THE CASE OF THE PIOUS FUND OF THE CALIFORNIAS 5 (1902). But the matter did not end there. The United States contended that Mexico owed additional interest on the fund,[11] and in an attempt to resolve the dispute, both nations agreed to submit to the jurisdiction of the Permanent Court of Arbitration at The Hague.[12] The Pious Fund case was the first judgment issued by the newly-established tribunal. HOWARD N. MEYER, THE WORLD COURT IN ACTION: JUDGING AMONG THE NATIONS 24 (2002). The Permanent Court of Arbitration issued a unanimous judgment against Mexico on October 14, 1902. Mexico was ordered to pay a lump sum of $1,460,682.67, and to make annual payments of $43,050.99. RALSTON, *supra,* at 15-16. Mexico complied with the judgment, which has now been paid in full. *See* FRANCIS J. WEBER, THE UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND 53 (1969).

The commitment of both nations to peaceful dispute resolution through arbitration wavered only once, and the results were disastrous. In 1910, the United States and Mexico agreed to arbitration to resolve a long-running border dispute in El Paso, Texas. Convention for the Arbitration of the Chamizal Case, June 24, 1910, U.S.-Mex., 36 Stat. 2481. The Convention established that the decision of the arbitral

---

[11] *Reports of International Arbitral Awards*, v. IX at 5, U.N. Sales No. 59.V.5 (1948).

[12] *See* Protocol for the Adjustment of Certain Contentions Arising Under What is Known as the "Pious Fund of the Californias," May 22, 1902, U.S.-Mex., 9 Bevans 12, 1902 U.S.T. LEXIS 50. Article XIV of the Protocol provided that "the award ultimately given hereunder shall be final and conclusive as to the matters presented for consideration."

commission would be "final and conclusive upon both Governments, and without appeal." 36 Stat. 2483. Nevertheless, when the Commission awarded a large portion of the disputed tract to Mexico, the United States refused to comply with the judgment. ALAN C. LAMBORN & STEPHEN P. MUMME, STATECRAFT, DOMESTIC POLITICS, AND FOREIGN POLICY MAKING: THE EL CHAMIZAL DISPUTE 54-55 (1988). The effects of this decision upon bilateral relations were "significant and lasting," and the United States's refusal to comply became "an integral part of almost every diplomatic issue arising between the two nations" for the following 52 years.[13] SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL DISPUTE 30 (1965). In addition to souring relations between the two countries, *see id.* at 77, the United States's reaction to the judgment led Mexico to reject arbitration as a method of resolving disagreements with United States and British oil companies after President Lázaro Cárdenas nationalized the Mexican oil industry in 1938. *Id.* at 75, 100. In addition, it led Mexico to temporarily suspend its compliance with the Pious Fund judgment entered by the Permanent Court of Arbitration.[14] *See* LAMBORN AND MUMME,

---

[13] In 1925, the United States rejected Mexico's suggestion that the dispute be submitted to the Permanent Court of International Justice (the precursor to the International Court of Justice) for arbitration. Since the United States refused to accept the jurisdiction of the international tribunal, the Court had no power to resolve the dispute. *See Convention With Mexico for Solution of the Problem of the Chamizal: Hearings Before the Committee on Foreign Relations, United States Senate*, 88th Cong. 21 (1963) (statement of Ambassador Thomas C. Mann) [hereinafter "Chamizal Hearings"].

[14] *See* WEBER, *supra*, at 42. Mexico suspended payments on the Pious Fund in 1915. In 1966, it resumed payments, *id.* at 51, and fully satisfied its obligations in 1967. *Id.* at 53.

supra, at 171; ANTONIO GÓMEZ ROBLEDO, MEXICO Y EL ARBITRAJE INTERNACIONAL 101 (1965).

In 1963, the United States finally recognized the Chamizal arbitral award. *See* LISS, *supra*, at 89. President Kennedy acknowledged the United States had been wrong in rejecting the Commission's judgment, commenting that "the charge against us for not having abided by the award is grave." *See* President's Message to the Senate Transmitting the Convention for the Solution of the Problem of the Chamizal, 88th Cong. 1-3 (1963); *Transcript of the President's News Conference on Foreign and Domestic Matters*, N.Y. TIMES, July 6, 1962, at A8.

Since then, the United States and Mexico have submitted numerous economic disputes to international tribunals for resolution. And in the early 1990s, both nations signed and ratified the North American Free Trade Agreement, which provides unprecedented opportunities for arbitration of disputes between states and private investors. Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289-397, 605-779. In *Metalclad v. Mexico*, an arbitral tribunal awarded a United States-based corporation $16.685 million in damages. *Metalclad*, supra n. 6. Although Mexico had vigorously contested Metalclad's claims, it complied with the judgment. Explaining its decision to pay Metalclad in accordance with the tribunal's decision, Mexico reaffirmed its commitment to honor its international obligations, "even when it does not agree with the findings of the international tribunal nor with the way the tribunal works." *Eye on Investors, Mexico Pays U.S. Company*, N. Y. TIMES, Oct. 29, 2001, at A4.

As the examples above make clear, both the United States and Mexico have long understood that when a dispute is submitted by mutual consent to an international tribunal for resolution – as under the Optional Protocol to the Vienna Convention – the resulting judgment is final and binding.

III. The Protection of Nationals Abroad Has Long Been a Priority of Both Mexico and the United States.

Ever since Mexico and the United States established diplomatic relations, the two countries have been actively involved in the protection of their nationals within the other's territory. In 1942, the two countries signed a bilateral consular convention that codified the customary rights of consular officers to assist their nationals. Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., art. 6, 57 Stat. 800. Among other things, the bilateral consular convention grants consular officers the right to visit detained nationals, to assist them "in proceedings before or relations with authorities of the State," and to "address the authorities, National, State, Provincial or Municipal, for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of rights accruing by treaty or otherwise." *Id.* The bilateral convention does not contain any provision for arbitration of disputes; instead, article 6 provides that grievances may be addressed through diplomatic channels. *Id.*

The 1963 Vienna Convention on Consular Relations reaffirmed the rights set forth in the Bilateral Convention and elaborated on the types of services consular officers could provide. Vienna Convention, arts. 5, 36. For example, article 5(i) of the Vienna Convention states that "Consular functions

consist in: ... representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State." Article 36(1)(c) reinforces this provision, expressly stating that consular officers may "arrange for [the] legal representation" of detained nationals. Significantly, the Optional Protocol to the Vienna Convention gave states parties an additional avenue for dispute resolution that was unavailable under the bilateral consular convention.

Within the framework of these two conventions, both nations have developed comprehensive programs of consular assistance to their nationals abroad.

A. Mexico Has an Active and Longstanding Tradition of Providing Extensive Consular Services to Its Nationals.

Mexican consular officers have provided services to detained Mexican nationals in the United States for nearly two hundred years. And as the population of Mexican nationals in the United States has expanded, Mexico's consular assistance program has become increasingly sophisticated. With 47 consulates, Mexico now has the most extensive consular network of any foreign nation in the United States.[15]

---

[15] Japan has the second largest consular network, with 19 consulates. U.S. DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, FOREIGN EMBASSIES AND CONSULATES IN THE UNITED STATES (available at http://www.travel.state.gov/law/consular/consular_745.html) (last visited May 31, 2007).

Mexico's commitment to the protection of its nationals stems in part from its conviction, born of experience, that most Mexican nationals are poorly equipped to navigate the legal system of a foreign country. Many Mexican nationals have little formal education and are desperately impoverished. They have trouble grasping abstract legal concepts, and often fail to understand their rights – even after their lawyers have attempted to explain them. Significant cultural and linguistic barriers impede their ability to communicate effectively with their attorneys and to participate fully in their defense. Even nationals who have resided in the United States for many years retain a strong connection with Mexican culture, and some never learn to speak English fluently. Consular assistance can often help overcome these unique disadvantages.

Cultural misunderstandings and linguistic barriers pervade many cases involving Mexican nationals, but these factors take on added significance when the national is facing capital punishment. Given the gravity of the penalty at stake, the Government of Mexico has instructed consular officers to monitor capital cases with particular care. Consular staff receive specialized training so that they can evaluate the quality of the legal representation in each case. The archives of the Foreign Ministry contain files reflecting the involvement of consular officers in death penalty cases in the United States dating back to at least 1920.[16]

---

[16] The Oklahoma Court of Criminal Appeals has found that Mexico provided "extensive assistance" to capital defendants in 1993, the year Mr. Medellín was arrested and charged with capital murder. *Torres v. State*, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005) (describing the quality of Mexico's consular assistance program in capital cases). *See also Marquez-Burrola v. State*, 157 P.3d 749 (Okla. Crim. App. 2007) (describing Mexico's efforts to assist trial counsel in the capital murder trial of a Mexican national); *Two*

Consular officers provide crucial services to Mexican nationals who are facing the death penalty. In accordance with their training, their principal concern is to ensure the defendant receives qualified and effective legal counsel. Over time, Mexico has concluded that the attorneys assigned to represent Mexican nationals often lack the experience and the resources necessary to provide a vigorous defense. In addition, most of the assigned lawyers do not speak Spanish and rarely enjoy access to Spanish-speaking investigators and experts. Even when the national speaks English fluently, his family usually does not. Thus, counsel's inability to speak Spanish presents a substantial impediment to obtaining mitigating evidence from relatives. And invariably, birth records and other critical documents can only be obtained in Mexico.

Consular officers are therefore instructed to support the defense by providing funds for investigators and experts; acting as a "cultural bridge" between the defendant and his lawyer;

Mexicans Die in Electric Chair, N.Y. TIMES, Jan. 28, 1921, at A3 (discussing unsuccessful battle of Mexican consular officers to prevent executions in New York); William Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 272 n.2 (1998) (citing a 1934 case in which Mexican consular officials sought access to a national held in a California jail); Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire*, N.Y. TIMES, Oct. 26, 2000, at A20 (describing consular involvement in a Florida capital prosecution, and noting Mexico's reported involvement in 261 death penalty cases since 1994); *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2001) (concluding that Mexico would have intervened in a 1989 capital murder prosecution to assist with a Mexican national's defense and to provide resources to ensure that the defendant received a fair trial and sentencing hearing).

communicating with the defendant's family members, friends and others who may be able to offer assistance or information vital to the defense; tracking down records and other documents; and identifying and transporting family members and other witnesses to the United States. If consular officers conclude that the defense attorney is not able to provide high quality representation, they attempt to secure more effective legal counsel.

Experience has taught the Government of Mexico that consular intervention is most effective prior to trial. Early consular intervention often persuades prosecutors to refrain from seeking the death penalty. Consular officers commonly search all archives and databases in Mexico to determine whether a defendant has a criminal record, and provide documentation of such searches to the prosecution. Consular officers can also obtain birth, school and medical records that provide proof of a defendant's physical or mental condition. This sort of evidence has influenced the outcome of dozens of cases. Statistics maintained by the Mexican Foreign Ministry demonstrate that in at least 142 cases since September 2000 where consular officers were informed of the Mexican national's detention prior to trial, prosecutors waived the death penalty.

In light of the services described above, it is not surprising that the United States government has acknowledged that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." 1 Counter-Memorial of the United States of America (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) 186 (Nov. 3, 2003).

B. The United States Has Been a Forceful Advocate for the Consular Rights of American Citizens Detained in Mexico.

United States consular officers have been no less assiduous in seeking to protect the rights of detained United States nationals in Mexico. As a close neighbor and treaty partner of the United States, Mexico fully appreciates that the United States has long been one of the most vigorous advocates of strict compliance with the Vienna Convention. As described above, the United States's inability to resolve complaints by its nationals in Mexico was one of the factors that led to war in 1846.

In 1975, complaints by United States citizens incarcerated in Mexico led to congressional hearings. At those hearings, State Department representatives testified at length regarding the rights of United States citizens to seek consular assistance:

> All of us regard consular protection as an inherent right of every citizen. That right is not affected by evidence or findings of guilt. . . . Providing consular protection to American citizens abroad is a basic historic responsibility of this Department and its consular officers.

U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International, Political and Military Affairs, Part I, 94th Cong. 16 (1975) (Statement of Leonard F. Walentynowicz). Mr. Walentynowicz observed that in order to fully protect the rights of prisoners and prevent abuses, immediate consular access was critical:

> A particular issue of prime importance is that of denied or delayed consular access. We believe that immediate consular access is the linchpin on which hangs in large measure the solution to many of our problems. With early access to each prisoner we are convinced we can go a long way toward guaranteeing the prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures.

Id., Part II, at 6. Finally, in keeping with the United States's long tradition of protecting the rights of its citizens in Mexico, the State Department emphasized the need to actively intervene in individual cases to ensure that justice is done:

> [W]e are persuaded that to make progress in protecting the rights of U.S. citizens in Mexico, we must repeatedly present Mexican authorities with the facts, demonstrate how they constitute a violation of Mexican and/or international law and norms, and insist that such violations be corrected and prevented in the future.

Id. at 63.

IV. The International Court of Justice Issued a Binding Judgment that Adjudicated the Rights of Individual Mexican Nationals.

In reviewing the claims of Mr. Medellín and the other Mexican nationals, the International Court of Justice was called upon to analyze the treaty's provisions and to apply that analysis to the underlying facts of each case. Mexico

accordingly presented the ICJ with information regarding the violation of the Vienna Convention in each case. Mexico provided, *inter alia,* copies of state and federal court decisions, affidavits, and transcripts relating to violations of Article 36 where available. *See* Memorial of Mexico (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) (June 20, 2003), Annexes 35-65. In the case of Mr. Medellín, Mexico supplied the International Court of Justice with the Texas trial court's findings of fact and conclusions of law from state post-conviction proceedings,[17] and provided a separate summary of the Texas court's reasons for rejecting Mr. Medellín's Vienna Convention claim. Memorial of Mexico at A-103, Annex 7, para. 238. For its part, the United States presented its own rendition of the facts of each case, made extensive legal arguments, and submitted over 2,500 pages of diplomatic correspondence, judicial opinions, law review articles, affidavits, and transcripts. Regarding Mr. Medellín, the United States submitted an account of state and federal post-conviction proceedings, including a description of how each court had resolved Mr. Medellín's Vienna Convention claim. Counter-Memorial at A-223, Annex 2, App. 38, para. 7.

The ICJ's final judgment reflects its careful consideration of these materials. The Court analyzed the procedural posture[18] and the facts of each case in determining whether the United States had violated its obligations under Article 36. In particular, where the facts were contested, the

---

[17] Memorial of Mexico, Annex 55.

[18] *See, e.g., Avena* Judgment at para. 20 (referring to the different stages of direct appeal and post-conviction review).

Court made detailed findings based on the extensive documentary evidence submitted by the parties. *See, e.g., Avena* Judgment at para. 57 (addressing United States's claim that certain Mexican nationals could have dual citizenship); *id.* at paras. 66-74 (evaluating United States's assertions that certain Mexican nationals had claimed to be U.S. citizens upon arrest); *id.* at para. 89 (reviewing facts of one case in response to United States's contention that the authorities had complied with their Article 36 obligations). The Court also distinguished between those cases in which the United States had violated *all* of its obligations under Article 36 – such as the case of Mr. Medellín – and those in which the United States violated only *some* of its provisions.[19] This is most apparent in the Court's discussion of Article 36(1)(c), which provides that consular officers may "arrange for [the] legal representation" of their nationals.

The Court observed that in 16 cases, Mexican consular officers had learned of their nationals' detention before trial, either through notification by United States authorities or by other means, with sufficient time to arrange for their legal representation. *Avena* Judgment, para. 104. In these cases, the Court concluded that the United States had not violated Article 36(1)(c). It recognized that even though the United States had failed to comply with its obligations to notify the 16 nationals of their consular rights "without delay," consular officers had

---

[19] For example, in the case of Ramiro Hernández Llanas, the Court concluded that the United States had violated its obligation to inform the defendant, without delay, of his consular rights. *Avena* Judgment, para. 76. Nevertheless, the Court held that the United States *had* advised the consular post of Mr. Hernández Llanas' detention without delay, in accordance with its obligations under Article 36(1)(b). *Id.* at para. 97.

nonetheless been able to provide some assistance to their nationals prior to trial. In the remaining 34 cases, however, including the case of Mr. Medellín, the Court found that the authorities' noncompliance with Article 36, coupled with Mexico's lack of knowledge of the detentions, had effectively prevented consular officers from arranging for legal representation or providing other resources to improve the quality of the defense. *Id.* at para. 106(4).

With regard to Mr. Medellín, the International Court of Justice held that the United States had violated its obligation under Article 36(1) to inform him of his right to consular notification and assistance, as well as the rights of Mexico to communicate with him, render consular assistance, and arrange for his legal representation. *Avena* Judgment at para. 153(4)-(7). To remedy these violations, the ICJ held that the United States had to "review and reconsider" Mr. Medellín's conviction and sentence by fully assessing the prejudice caused by the Vienna Convention violations. *Id.* at para. 153(9). The ICJ rejected the United States's argument that review and reconsideration could be achieved through the clemency process, holding instead that the review must occur "within the overall judicial proceedings relating to the individual defendant concerned." *Id.* at 141; *see also id.* at 140.

The *Avena* Court set forth specific requirements for effective review and reconsideration. *First,* the *Avena* Court held that procedural default doctrines may not be invoked where it was "the failure of the United States itself to inform" the national of his Article 36 rights that impeded his ability to raise the violation at trial. *Id.* at paras. 112-13. *Second*, the ICJ emphasized that review and reconsideration had to be

"effective" and "guarantee that the violation and the possible prejudice caused by that violation . . . be fully examined and taken into account:"[20]

> [I]n a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" – a concept relevant to the enjoyment of due process rights under the United States Constitution – but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that *full weight* is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

Avena Judgment, para. 139 (emphasis added). *Third,* the *Avena* Court explained that review and reconsideration must be conducted by a court that is empowered "to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.* at para. 122.

Unlike the petitioners in *Sanchez Llamas v. Oregon*, 126

---

[20] *Avena* Judgment at para. 138; *see also id.* at para. 131.

S. Ct. 2669 (2006), Mr. Medellín's rights were directly adjudicated by the International Court of Justice. There can be no dispute that the *Avena* Judgment is binding between Mexico and the United States as regards Mr. Medellín's case. *See* I.C.J. Statute, Art. 59. This difference is crucial, and as the United States has recognized, it requires that the state courts set aside any procedural barriers that would otherwise bar review of Mr. Medellín's Vienna Convention claim on the merits.

V. The United States Is Obligated to Fully Implement the *Avena* Judgment.

The United States agrees that it has an international legal obligation to comply with the *Avena* Judgment. *See* Petition for Writ of Certiorari at 187a, *Medellín v. Texas,* 127 S. Ct. 2129 (2007). Accordingly, the President determined that the United States would discharge its obligations under *Avena* by having state courts give effect to the decision. *Id.* The Texas Court of Criminal Appeals, however, held that neither the *Avena* Judgment nor the Presidential Determination were binding upon it. Specifically, the Texas Court found that the President of the United States had exceeded his executive authority to ensure that the nation complied with its obligations under *Avena*. *Ex parte Medellín*, 2006 WL 3302639 at *24.

The absence of an executive agreement between the United States and Mexico was "central" to the Texas court's plurality decision that the President had exceeded his constitutional powers. *Ex parte Medellín*, 2006 WL 3302639 at *17. The plurality characterized the Presidential Determination as a "unilateral act executed in an effort to achieve a settlement with Mexico," when no actual settlement had been reached. *Id.*

at *16. It implied that the United States and Mexico should "negotiate" the conditions under which the United States should carry out its obligations under the *Avena* Judgment, observing that the negotiation process "ensures that each sovereignty is represented and heard." *Id.* "What is ultimately achieved through that process, which invariably involves compromise, will reflect a meeting of the minds--a settlement that embodies the terms, conditions, rights, and obligations agreed to during the negotiation process." *Id.*

The Texas court's decision reflects its utter failure to grasp the nature of the international legal proceedings that led to this litigation. Both the United States and Mexico had already agreed *in advance* to be bound by the *Avena* Judgment by acceding to the Optional Protocol, the United Nations Charter, and the ICJ Statute. *See supra* at 5-6. The *Avena* Judgment represents the "settlement" of Mexico's dispute with the United States, and it fully addresses the "rights and obligations" of the United States with respect to the remedy owed to Mr. Medellín. The International Court of Justice agrees:

> [T]he ICJ has always taken the view that it would be incompatible with the spirit and the letter of the [ICJ] Statute and with judicial propriety to deliver a judgment the validity of which would be subject to the subsequent approval of the parties or which would have no practical consequences so far as their legal rights and obligations were concerned. . . . Since, furthermore, a case can only be submitted to the Court and decided by it if the parties have in one way or another consented to its jurisdiction over the case in question, it is rare for a decision not to

> be implemented. Generally speaking, those States which accept the jurisdiction of the Court are ready to comply with its decisions.

INTERNATIONAL COURT OF JUSTICE, ICJ HANDBOOK 75 (5th ed. 2004) (citations omitted), *available at* http://www.icj-cij.org/icjwww/igeneralinformation/ibleubook.pdf (last visited March 6, 2007). *Cf. La Abra Silver Mining*, 175 U.S. at 463 ("an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned").

Accordingly, there is no need for "negotiation" and "compromise," nor are the parties required to reach a "meeting of the minds" with regard to the *Avena* Judgment. Indeed, it was precisely because negotiations had failed to resolve this dispute that Mexico invoked the Optional Protocol and initiated proceedings before the ICJ.

Likewise, there is no need for a negotiation process that will "ensure that each sovereignty is represented and heard," for both Mexico and the United States were "represented and heard" before the International Court of Justice. A 16-lawyer delegation represented the United States during the one-week hearing in which both nations presented their arguments. The State Department's Legal Adviser, Principal Deputy Legal Adviser, Assistant Legal Adviser for Consular Affairs and Assistant Legal Adviser for United Nations Affairs, an Associate Deputy Attorney General from the Justice Department, and distinguished professors of international law and comparative criminal procedure all argued for the United States. *See Avena* Judgment, preface. Mexico, in turn, was represented by fifteen lawyers, including the legal adviser to the

Mexican Foreign Minister, the Chief of Staff for the Under-Secretary for Global Affairs and Human Rights, the Head of the International Litigation Section of the Mexican Foreign Ministry, the Head of the International Law Section of the Mexican Foreign Ministry, and other distinguished professors and advocates. *Id.*

Although the ICJ took great care to define the parameters of adequate "review and reconsideration," the Court left to the United States the choice of means to implement the Judgment. *Avena* Judgment, ¶154(9). Thus, it is for the United States—not Mexico—to decide which courts are best suited to carry out the process of review and reconsideration. Mexico's interest is in ensuring that each Mexican national subject to the *Avena* Judgment receives full and fair review and reconsideration of his conviction and sentence under the terms set forth in the *Avena* Judgment. Mexico welcomed the Presidential Determination as an indication of the President's intent to bring the United States into compliance with the ICJ's mandate. Had Mexico opposed the President's action, it would not have submitted an amicus brief to the Texas Court of Criminal Appeals in support of Mr. Medellín's argument that the court should abide by the President's determination.

CONCLUSION

Mexico fully expects that its treaty partners are capable of carrying out the obligations undertaken by their duly authorized representatives. In this case, the United States promised Mexico that it would abide by the final judgment of the International Court of Justice regarding the treatment of

Mexican nationals whose rights were violated under Article 36 of the Vienna Convention on Consular Relations. *Amicus curiae* the Government of Mexico respectfully urges this Court to ensure the United States lives up to that promise by reversing the decision of the Texas Court of Criminal Appeals.

Respectfully submitted,

Sandra L. Babcock
Counsel of Record
Bluhm Legal Clinic
Northwestern Law School
357 E. Chicago Avenue
Chicago, IL 60611
(312) 503-0114